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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re DEAN ROBERT ANCHOR,

on Habeas Corpus.

H033724
(Santa Cruz County
Super. Ct. No. CR0027)

In this appeal, we review whether the superior court properly granted Dean Anchor's petition for habeas relief arising out of a 2008 hearing before the Board of Parole Hearings (the Board).

In 1987, Dean Anchor (Anchor), currently, a California state prison inmate, murdered Joyce Green by striking her in the head 23 times with a blunt object. Following a jury trial, he was found guilty of second degree murder and sentenced to an indeterminate term of 15 years to life in state prison. His minimum eligible parole date was January 4, 1996, over 13 years ago. Appellant, Michael Martel, the acting warden of Mule Creek State Prison where Anchor is incarcerated, appeals from an order of the Santa Cruz County Superior Court granting habeas relief to Anchor.¹ With modifications, we affirm the order of the superior court.

¹ Generally, although a habeas petition is "directed to the person having custody of or restraining the person on whose behalf the application is made" (Pen. Code, § 1477), Anchor challenged the actions of the Board of Parole Hearings. Accordingly, we refer to appellant as the Board.

Background

Following his sixth denial of parole, on June 23, 2008, Anchor filed a petition for writ of habeas corpus in Santa Cruz County Superior Court. On July 1, 2008, the superior court issued an order to show cause (OSC) why the petition should not be granted. On August 1, 2008, the Board requested that the Santa Cruz County Superior Court stay the order to show cause pending the decisions in *In re Lawrence* (2008) 44 Cal.4th 1181 and *In re Shaputis* (2008) 44 Cal.4th 1241. The superior court granted the Board's request and stayed the order until October 2, 2008.

On October 2, 2008, the Board filed a return in which the Board argued that its January 23, 2008 decision finding Anchor unsuitable for parole satisfied Anchor's due process rights because it was supported by "the evidence" that Anchor currently remains an unreasonable threat to public safety. The Board asserted that Anchor's "mere disagreement with how the Board chose to weigh and consider the evidence in the record does not amount to a violation of due process."

On October 20, 2008, Anchor filed a traverse in which he asserted that the Board set forth no evidence demonstrating that his parole currently posed an unreasonable risk of danger to public safety other than the immutable facts of his commitment offense.

The superior court set the matter to be heard on December 8, 2008. Following a hearing, during which Judge Stevens inquired of counsel for the Board whether the court was limited to looking at the Board's findings or whether the court could examine the record de novo, the court granted Anchor's petition for writ of habeas corpus.² Judge Stevens ordered that Anchor be released from the Department of Corrections. The court stated that no written order would be prepared, but allowed the parties to prepare an

² Counsel for the Board explained to the court that judicial review was concerned only with whether or not the Board's decision was supported by some evidence that Anchor poses a current risk of danger to society if released.

order. Thereafter, Anchor's counsel prepared a three-page proposed order to which the Board objected. The Board asserted that Anchor's counsel had not consulted with them on the proposed order and the proposed order was not an accurate memorialization of the court's findings during the December 8, 2008 hearing. The Board suggested that an order that stated simply "the petition is granted and the prisoner is released" was more appropriate. Accordingly, Judge Stevens's written order dated December 23, 2008, states "[t]he petition is granted as there is not some evidence to support the Board of Parole Hearings' January 23, 2008 decision that petitioner is unsuitable for parole. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212.) [The Board] is ordered to release petitioner from prison."

On December 30, 2008, the Board filed a notice of appeal. On application of the Board by petition for writ of supersedeas, this court granted a stay of the superior court's order on March 5, 2009.

The Board's Regulatory Scheme and this Court's Scope of Review

Penal Code section 3041, subdivision (a) states that the Board, prior to the inmate's minimum eligible parole release date shall meet with the inmate and "shall normally set a parole release date" California Code of Regulations, title 15, section 2402, subdivision (b) sets forth the manner in which an inmate's suitability for parole is to be determined by the Board. Section 2402, subdivision (a)³ states that "[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison."

Section 2402, subdivision (c) identifies six nonexclusive circumstances *tending to show unsuitability*, the relative importance of which "is left to the judgment of the panel."

³ Unless noted, all undesignated regulation and section references are to Title 15 of the California Code of Regulations.

One of the specified circumstances is "(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner."⁴

Factors that support a finding that the prisoner committed the offense in an especially heinous, atrocious, or cruel manner include the following: "(A) Multiple victims were attacked, injured, or killed in the same or separate incidents; [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; [¶] (C) The victim was abused, defiled, or mutilated during or after the offense; [¶] (D) The offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (§ 2402, subd. (c)(1).)

In *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*), our Supreme Court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by *some evidence* in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (Italics added.)

⁴ The remaining circumstances are "(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age. [¶] (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others. [¶] (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim. [¶] (5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense. [¶] (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail." (§ 2402, subd. (c).)

Before its opinions in *Lawrence*, *supra*, 44 Cal.4th 1181, and *In re Shaputis*, *supra*, 44 Cal.4th 1241 (*Shaputis*), the California Supreme Court had held that this " 'some evidence' standard is extremely deferential." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 665.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor [or Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor [or Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board]'s decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's [or Board's] decision." (*Id.* at p. 677.)

In *Lawrence* and *Shaputis*, the court clarified, but did not overrule, this scope of review.

In *Lawrence*, the inmate's commitment offense was a result of her having an affair with a dentist. The dentist ended the affair and told the inmate that he was staying with his wife. Armed with a gun and potato peeler, the inmate confronted the dentist's wife, shot her, and repeatedly stabbed her with the potato peeler. The inmate fled and remained a fugitive for 11 years. After turning herself in and being sentenced to life in prison, the inmate became an exemplary prisoner, had no discipline violations, took numerous self-help classes, and had positive psychological examinations. The Board granted her parole three times, but the Governor reversed the decision each time. In 2005, the Board granted parole for the fourth time, and the Governor again reversed the decision. The Governor found that the inmate (1) remained an unreasonable safety risk

due to the callous nature of the commitment offense, (2) had had some negative psychological evaluations when she was first incarcerated, and (3) had been counseled regarding discipline problems while in prison. The Court of Appeal reversed the Governor's decision, finding that the Board had properly determined that defendant was suitable for parole. The Supreme Court granted review to resolve the dispute that had arisen in several appellate court cases as to the appropriate scope of review. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1190-1192.)

Before *Lawrence*, some cases had interpreted *Rosenkrantz* to require that a parole denial must be upheld if "some evidence" supported one of the circumstances tending to establish unsuitability for parole such as that the commitment offense was particularly egregious. (See *In re Bettencourt* (2007) 156 Cal.App.4th 780, 800; *In re Andrade* (2006) 141 Cal.App.4th 807, 819; *In re Burns* (2006) 136 Cal.App.4th 1318, 1327-1328.) Other cases had interpreted *Rosenkrantz* to require that "some evidence" supported the ultimate determination that the inmate remained a current threat to public safety. (See *In re Lee* (2006) 143 Cal.App.4th 1400, 1409; *In re Scott* (2005) 133 Cal.App.4th 573, 595; *In re Elkins* (2006) 144 Cal.App.4th 475, 499.)

In *Lawrence*, the Supreme Court reasoned that "[i]f we are to give meaning to the statute's directive that the Board *shall normally* set a parole release date ([Pen. Code.] § 3041, subd. (a)), a reviewing court's inquiry must extend beyond searching the record for some evidence that the commitment offense was particularly egregious and for a mere *acknowledgment* by the Board or the Governor that evidence favoring suitability exists. Instead, under the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current

dangerousness to the public. [¶] Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra*, 44 Cal.4th at p. 1212.)

The *Lawrence* court discussed the appropriate weight to be given to the commitment offense. Thus, in evaluating the crime, "it is not the circumstance that the crime is particularly egregious that makes a prisoner unsuitable for parole—it is the implication concerning future dangerousness that derives from the prisoner having committed that crime." (*Lawrence, supra*, 44 Cal.4th at pp. 1213-1214.)

The *Lawrence* court went on to state, "although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1214.) The court continued, "[a]bsent affirmative evidence of a change in the prisoner's demeanor and mental state, the circumstances of the commitment offense may continue to be probative of the prisoner's dangerousness for some time in the future. At some point, however, when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Id.* at p. 1219.)

The *Lawrence* court recognized that despite an egregious commitment offense, "it is evident that the Legislature considered the passage of time—and the attendant changes in a prisoner's maturity, understanding, and mental state—to be highly probative to the determination of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at pp. 1219-1220.) Finally, the *Lawrence* court concluded: "In sum, the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Id.* at p. 1221.)

In applying this scope of review to the facts in *Lawrence, supra*, 44 Cal.4th 1181, the court concluded that, although the crime committed by the inmate was egregious, it rejected that other factors—prior poor psychological evaluations and being counseled eight times for misconduct such as being late to appointments—supported that the inmate was currently dangerous. Accordingly, the *Lawrence* court concluded: "[E]ven as we acknowledge that some evidence in the record supports the Governor's conclusion regarding the gravity of the commitment offense, we conclude there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." (*Id.* at p. 1225.) "When, as here, all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the

commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id.* at pp. 1226-1227.)

In a companion case, the Supreme Court applied the scope of review set forth in *Lawrence*. In this companion case, the inmate had a long history of domestic violence and eventually shot and killed his second wife. The other factors of unsuitability and suitability were that the inmate had (1) a long criminal history (but the instant offense had resulted in his first felony conviction), (2) severe substance abuse problems, (3) little contact with his family throughout his incarceration, (4) participated in self-help programs, (5) been discipline free throughout his incarceration, and (6) positive psychological examinations. The Board initially denied parole, citing to the callous nature of the crime and the fact that the inmate had a history of domestic violence. The superior court upheld the Board's ruling, but the Court of Appeal reversed the decision after finding that the Board had erred in concluding that the inmate was not suitable for parole. The Court of Appeal ordered a new parole hearing, the Board thereafter granted parole, but the Governor reversed the Board. After the Court of Appeal reversed the Governor's decision, the Supreme Court granted review. (*Shaputis, supra*, 44 Cal.4th at pp. 1245-1251.)

The *Shaputis* court reiterated what it had held in *Lawrence*. The court stated: "[T]he proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." (*Shaputis, supra*, 44 Cal.4th at p. 1254.) The *Shaputis* court explained the proper scope of review as follows. "When a court reviews the record for some evidence supporting the Governor's conclusion that a petitioner currently poses an unreasonable risk to public safety, it will affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors." (*Id.* at p. 1258.) In applying

that standard to the facts in *Shaputis*, the court concluded that the inmate was not suitable for parole due to both the aggravated circumstances of the commitment offense, and " 'his lack of insight into the murder and the abuse of his wife and family.' " (*Id.* at pp. 1255, 1259-1260.)

When a superior court grants relief on a petition for writ of habeas corpus without an evidentiary hearing, as happened here, the question presented on appeal is a question of law, which we review de novo. (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677 [if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence a reviewing court independently reviews the record].)

Background

*The Life Crime*⁵

Joyce Green, an outcall masseuse, failed to return from an appointment with Jerry Anchor. On the basis of this information, relayed to him by Green's roommate, an officer of the Santa Cruz police department went to 1116 Lawrence Street, but found the house dark and unoccupied. However, in front of the house the officer saw a Plymouth automobile registered to Joyce Green. The investigating officer returned to the police department where he met with several of Green's friends. The friends told him that Green advertised as a masseuse in the local paper and had received a call from a Jerry Anchor,⁶ who gave directions to his residence at 1116 Lawrence Street. Green left for her appointment, but failed to call after the appointment finished, as was her normal procedure.

⁵ The summary of the commitment offense is taken from the record of Anchor's January 23, 2008 parole hearing. In turn, this summary appears to be taken from the probation officer's report in this case.

⁶ There is some confusion in the transcript of the hearing and the probation officer's report from the time of Anchor's trial as to whether the person was Terry or Jerry Anchor. For consistency we refer to the person as Jerry Anchor.

When officers returned to 1116 Lawrence Street they found the lights on and the house occupied. The officers contacted Jerry Anchor. He allowed the officers to enter and search the residence. During the search, the officers determined that there was no forced entry and the burglar alarm had been activated. At one point, Jerry Anchor opened a door leading to a room separated from the main part of the house. Jerry Anchor described the room as a bedroom used by his son and his son's girlfriend.

The officers observed the body of a Caucasian female approximately 30 years old. She had suffered numerous wounds to the head. There was a great deal of blood on her scalp and on the floor beneath her head. In addition, blood was spattered on the wall and the adjacent door. On a nightstand across the room was a mirror with a white powdery substance, which the officers believed to be cocaine. Two empty beer bottles and a half full bottle of wine were found in the room. The room was in disarray. The victim was unclothed from the waist up, wearing only a teddy and underwear. Upon finding a purse and jacket the officers were able to determine that the victim was Joyce Green. The officers located an automobile mechanic's breaker bar wrapped partially inside a blanket. There appeared to be blood on the handle of the bar. Subsequently, the coroner determined that Green had suffered 23 blunt object wounds to the head, which had caused her death.

Jerry Anchor told the police that he and his son Dean Anchor, Dean's girlfriend and his sometimes gardener John Stott had keys and access to the room where Green was found. Jerry Anchor told the police that he and his girlfriend had been in Mendocino County in the preceding days, which the officers were able to confirm. Dean's girlfriend had been staying in Capitola, which again the police were able to confirm. John Stott was interviewed and stated that he had been living in his van in front of the house where he was doing some gardening work. A warrant was requested for Dean Anchor's arrest.

Several days later, the police arrested Dean Anchor at the Chope Community Hospital where he had been hospitalized in the crisis unit confused and indicating that he had a drinking problem.

The Hearing

A member of the Board read a summary of the commitment offense into the record. Anchor was asked if he believed he committed the crime. Anchor replied that he did, based on the information to which he was made privy from the time of his arrest through trial. However, he had no independent recollection of the events.

The Board reviewed Anchor's prior criminal record, which consisted of a forgery conviction that occurred in 1973 when he was 18 years old. Anchor's next conviction for possession of a controlled substance occurred in 1974, and he had a vandalism conviction in 1976. In 1979, Anchor was arrested and convicted for reprimanding his girlfriend's six year old daughter by pushing her against a bathroom counter, blackening her eyes, bloodying her nose, and making her wash her mouth out with soap. Anchor explained that his then wife had asked him to discipline her daughter who had broken into a neighbor's house and stolen some toys. Anchor conceded that he had dealt with it in "all the wrong ways." He slapped the child a lot harder than he thought, but he recognized that alcohol played a part in the overreaction.

Thereafter, the Board went over Anchor's family history and his conduct while incarcerated. Anchor admitted that he had had a couple of physical altercations with a former girlfriend or "common law wife," but no violence with his former wife, to whom he was now engaged and with whom he planned to live if released.

The Board noted that Anchor had remained discipline free since September 1995; that most of his "disciplinaries" before then had been related to his drug use in prison; and that he had upgraded his education by receiving his GED and by studying for and receiving a paralegal "degree" in 1997. The Board asked Anchor what had changed since 1995, to which he replied that he had "finally woke up and decided if [he] didn't start

doing something different, [he] was going to spend [his] entire life in prison." The Board asked Anchor what had helped him the most with his drug addiction. Anchor asserted that continuous attendance in Narcotics Anonymous (NA) had helped him the most.

Anchor explained to the Board that in addition to continuing his paralegal studies he had been involved with his father in managing a small investment portfolio, which had accumulated him \$70,000. Anchor produced his end of year statement for the Board.

The Board noted that Anchor had been involved in NA on an ongoing basis. Anchor informed the Board that he was starting his second term as chairman of his group. The Board asked him about the ninth step of the 12-step program. Anchor explained that the eighth and ninth steps go together; "[t]he ninth step is making amends wherever possible where it won't harm or injure the people you're making amends to." The Board asked who was at the top of the list of people that he had made amends to. Anchor explained that his family was at the top of the list. The Board asked if there was anyone else. Anchor explained that he had thought about making amends to the victim's family, but believed that trying to make amends would "bring up . . . a traumatic thing all over again for somebody."

Then, the Board asked who was at the top of Anchor's list under the eighth step. Anchor responded that his fiancée was at the top. The Board asked, "[a]nd what about the victim?" Anchor responded, "of course." The Board asked Anchor to clarify where the victim was on his list. Anchor replied that the victim was at the top, then his wife, and the rest of his family along with the victim's family.

The Board reviewed Anchor's psychological evaluation. Anchor's 2007 psychological evaluation conducted by Dr. Record assessed Anchor's overall risk for violence as " 'low' risk for future violence." Dr. Record noted that Anchor had had a long history of drug abuse, including using drugs after he was committed to prison. However, Anchor had continued to work in NA and had become chairman of his group.

Accordingly, Dr. Record concluded that he had no further plans in which Anchor could participate to improve his chances of not using alcohol and drugs if released.

Dr. Record noted that Anchor had addressed the issues related to his commitment offense and had "fully committed to the underlying causes of the alcohol and substance abuse contributing to the controlling offense. He has accepted his responsibility and it is well documented over the past ten years."

As to Anchor's plans if released from prison, the Board noted that Anchor planned to live with his disabled fiancée in a trailer home in Amador County. Anchor explained that he helped out with the trailer payments by using some of the cash in his investment portfolio to supplement her disability payments. Anchor submitted a monthly budget to the Board in which he anticipated paying the bills. The Board noted that they had received supportive letters from Anchor's fiancée, his father Gerald Anchor, his mother and her husband, and his brother Dan Anchor. Anchor said that he would most like to work as a paralegal, but would also like to be involved with his father in managing portfolios. Anchor told the Board that his brother had offered to employ him as a truck driver.

After deliberating, the Board concluded that Anchor was not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. The Board stated that it had "relied on the following circumstances" in reaching this conclusion. "This offense was egregious, was a crime of extreme cruelty against a woman." The victim was "particularly vulnerable." The offense was carried out "dispassionately." The victim was "abused, defiled and mutilated during this offense." The offense was "carried out in a manner demonstrating exceptionally callous disregard for human suffering." "The motive for this crime is simply inexplicable." The Board noted, "Sir, you do have a history of assaults, prior criminality, and an escalating pattern of criminal conduct"; and "an extensive polysubstance abuse history"

The Board did commend Anchor on his exemplary behavior since 1995 in upgrading his education and attaining above average work evaluations in prison. The Board noted that Anchor had continuously attended NA and appeared to have internalized the principles of NA. The Board noted the favorable psychological evaluation that Anchor had received. The Board expressed concern about Anchor's parole plans to work with investment portfolios to help support himself and his fiancée, but concluded that because Anchor's brother had offered him employment as a truck driver employment was a realistic possibility. The Board felt that Anchor still had not addressed his relationship with women, particularly his assaultive behavior towards women including his fiancée's daughter, Joyce Green and his former common law wife. The Board asked Anchor to do self-help reading to help Anchor address this concern.

Discussion

The Board's decision identified an immutable factor to deny Anchor parole, the commitment crime, but failed to relate the identified immutable factor to circumstances that would make them probative of Anchor's current dangerousness. (See *Shaputis, supra*, 44 Cal.4th at p. 1260 [decision must reflect "*due consideration of specified factors* as applied to the individual prisoner in accordance with applicable legal standards"].) "[T]he aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness" (*Lawrence, supra*, 44 Cal.4th at p. 1214.) "[M]ere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id.* at p. 1227.) Immutable facts, such as the circumstances of the commitment offense, may be relied upon but must be related to the ultimate determination of current dangerousness. (See *id.* at p. 1221.) " '[D]ue consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the

necessary basis for the ultimate decision—the determination of current dangerousness." (*Id.* at p. 1210.)

At the outset, we do not take issue with the Board's evaluation of the aggravated nature of the commitment offense, which appears to be the primary ground upon which it denied parole. However, as discussed at length in *Lawrence* and *Shaputis*, the nature of Anchor's commitment offense was a valid basis for denying parole only if there was no affirmative evidence of a change in Anchor's demeanor and mental state since the time of the offense. The Board here was obligated to weigh the commitment offense, and other factors that it considered, against factors tending to show suitability for parole (see § 2402, subd. (c))—to determine whether, on balance, *currently*, Anchor poses an unreasonable risk of danger if released on parole.

Nevertheless, the Board argues that there is some evidence supporting its decision that Anchor poses an unreasonable risk of danger to society if released from prison. The Board argues that the evidence of the aggravated nature of the commitment offense, Anchor's prior criminal record, his pattern of violence toward females and incidents of domestic violence, his extensive drug-use history, his institutional misconduct, his need for insight and self help with regard to his violence toward females, his need for introspection into what caused his extreme violence during the commitment offense, and his lack of remorse for his victims. The Board contends that when viewed in the aggregate, these factors illustrate that Anchor remains a threat to the public. Accordingly, some evidence supports the Board's decision that Anchor is currently dangerous.

The Board's attempt to compare this case to *Shaputis* is unavailing. In *Shaputis*, *supra*, 44 Cal.4th 1241, as noted the defendant shot and killed his wife. The California Supreme Court determined that "some evidence in the record support[ed] the Governor's conclusion that [Shaputis] remain[ed] a threat to public safety in that he ha[d] failed to take responsibility for the murder . . . , and despite years of rehabilitative programming and participation in substance abuse programs, ha[d] failed to gain insight into his

previous violent behavior" (*Id.* at p. 1246.) Although the evidence was to the contrary, Shaputis nevertheless insisted the shooting had been an accident. The Supreme Court determined that, due to Shaputis's attitude and prior conduct, the commitment offense was not "an isolated incident, committed while [Shaputis] was subject to emotional stress that was unusual or unlikely to recur. . . . Instead, the murder was the culmination of many years of [Shaputis's] violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Id.* at p. 1259.) In addition, Shaputis had "found 'inexplicable' his daughters' prior allegations of molestation and domestic violence [and] had a flat affect when discussing these allegations[.]" (*Id.* at p. 1252.)

Unlike in *Shaputis*, *supra*, 44 Cal.4th at pages 1251-1252, where the defendant had a " 'schizoid quality to interpersonal relationships,' " Anchor has no such history [Anchor "does not demonstrate any active signs or symptoms of a major mental illness"]. Furthermore, the record reflects that Anchor has expressed remorse for his crime ["I wish there was a way I could undo it. I wish I could change places with the victim"]; he understands the role drugs and alcohol played in his crime and in his violence towards women and has addressed his substance abuse [Anchor "has addressed the issue and has fully committed to the underlying causes of the alcohol and substance abuse contributing to the controlling offense. He has accepted his responsibility and it is well documented over the past ten years"]. Moreover, Anchor recognizes the importance of substance abuse treatment. He has attended NA meetings, becoming the chairman of his group, and presented the Board with the current listings of all the AA and NA meetings in the general vicinity of where he wished to live in Amador County.

The Board cites no evidence that Anchor lacks insight into his crime other than the fact that he cannot remember the murder, or what happened after the incident. Yet, as noted, Anchor's psychological evaluations are to the contrary. Here, the Board's unsupported belief that all of the psychological reports are wrong does not constitute some evidence that Anchor currently poses an unreasonable risk of danger to society if

released. (*In re Dannenberg* (2009) 173 Cal.App.4th 237, 256 [unsupported beliefs that all of the psychological reports are wrong does not constitute some evidence that in an inmate currently poses an unreasonable risk of danger to society if released].)

Furthermore, denying Anchor parole because he does not remember committing the murder, places Anchor in an impossible situation. If, taking the cue from the Board, he had stated that he now remembers the circumstances of what happened, the Board could deny parole on the ground that Anchor's acceptance of responsibility was recent, still evolving, and incomplete. The process of determining whether to grant or deny parole does not permit placing an inmate in such a situation. Decisions must be made on the basis of the evidence presented and, as noted, the uncontradicted evidence shows that, whether or not he *remembered* the circumstances of the murder, Anchor has long accepted personal responsibility for the *commission* of the crime. Under the facts here, the failure to remember specific prior acts does not suggest a failure to accept full responsibility.

Furthermore, other factors that the Board identifies here on appeal such as Anchor's prior criminal record, his extensive drug use, and his early institutional conduct are immutable facts. Immutable facts may be relied upon, but must be related to the ultimate determination of current dangerousness. The Board fails to make that required nexus here on appeal. (*Lawrence, supra*, 44 Cal.4th at p. 1221.)

Based on the entire record before the Board at Anchor's 2008 parole suitability hearing, we conclude the record is devoid of any evidence to support the conclusion his release would constitute a current threat to public safety.

The Board asserts that, even if its decision lacks evidentiary support, the appropriate remedy is to remand for another hearing, rather than to order Anchor released on parole. However, it appears from the record that the Board considered Anchor's entire file, and fully articulated all of the reasons supporting its conclusion Anchor was unsuitable for parole. Nevertheless, it is important to note that the Board rendered the

decision in this case before *Lawrence* and *Shaputis* were decided. Thus, here, the Board did not have benefit of *Lawrence* and *Shaputis*. In these circumstances, we cannot presume that the Board applied the evidentiary standard as clarified by *Lawrence* or that it would have reached the same conclusion had it done so. Accordingly, remand is warranted.

We are mindful that our judicial review of a parole decision must be exercised carefully so that it does not violate the separation of powers by intruding upon the executive branch's broad discretion in parole-related matters. (See, e.g., *In re Lugo* (2008) 164 Cal.App.4th 1522 [order requiring Board to state a significant change in circumstances justifying decision to deny parole for more than one year following a prior one-year parole denial violated separation of powers doctrine]; *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095, 1099 [court order allowing inmate to question commissions about their parole-related decision process violated separation of powers]; *In re Masoner* (2009) 172 Cal.App.4th 1098 [trial court's order directing inmate's release violated separation of powers because Board must be given opportunity to determine if new evidence of his conduct or change in his mental state support a determination that he is currently dangerous].)

However, for the guidance of the Board, we reiterate, " 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1210.) This is what due process requires. (*Id.* at p. 1212; *Board of Parole Hearings v. Superior Court (Portee)* (2008) 170 Cal.App.4th 104, 112, fn. 10.)

Furthermore, we remind the Board that "in directing the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility,

and a commitment to living within the strictures of the law." (*Lawrence, supra*, 44 Cal.4th at p. 1219.)

Disposition

The matter is remanded to the superior court with directions to modify its order granting Anchor's petition for habeas corpus. The superior court shall strike the last line of the order and insert the following: The Board of Parole Hearings is directed to vacate its 2008 parole decision and to hold a new hearing and issue a new decision within 60 days of this order. The Board shall proceed in accordance with due process in light of *In re Lawrence* (2008) 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241, taking into account all relevant regulating factors for which there is evidentiary support in the record.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.